U.S. Department of Labor

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Issue Date: 06 March 2006

CASE NO.: 2004-LCA-00040

In the Matter of

ADMINISTRATOR, WAGE AND HOUR DIVISION,
Prosecuting Party,

v.

HOME MORTGAGE COMPANY OF AMERICA, INC.;
And **ROLAND DAVID**,
Respondents.

Appearances: Susan B. Jacobs, Esq., attorney for U.S. Department of Labor
Tomas Espinosa, Esq., attorney Respondents

Before: PAUL H. TEITLER
Administrative Law Judge

DECISION AND ORDER

This matter arises under the Immigration and Nationality Act H-1B visa program ("the Act"), 8 U.S.C. §1101(a)(15)(H)(I)(b) and § 1182(n), and the regulations promulgated there under at 20 C.F.R. Part 655, Subparts H and I, 20 C.F.R. §655.700 et seq. A hearing was held before me in Cranford, New.Jersey. on March 21-24, 2005.

The H-1B visa program allows employers in the United States to employ non-immigrants for specialized jobs in which they have been unable to place United States citizens. To effectuate such employment, the Employer must submit a Labor Condition Application to the Department of Labor that details the position, including its actual and prevailing wages. The Administrator of the Wage and Hour Division is the prosecuting party for any suspected violations of this program. Here, the Administrator alleges the underpayment of wages to fourteen H-1B employees of Home Mortgage Company of America, Inc. The Administrator also alleges the willful misrepresentation of the occupational classification on the Labor Condition Applications of seven of these fourteen employees.

The findings of fact and conclusions of law which follow are based upon my observations of the demeanor of the witnesses who testified at the hearing and upon my thorough analysis and review of the entire record, arguments of the parties, and applicable statutes, regulations, and

case law. Each exhibit entered into evidence, although possibly not mentioned in this Decision, has been carefully reviewed and considered in light of its relevance to the resolution of a contested issue.

SUMMARY OF THE EVIDENCE

Testimony of Roland David

Roland David testified at a deposition conducted on December 21, 2004 and at the hearing in Cranford, New Jersey. Mr. David stated that he was the founder, President and sole shareholder of Home Mortgage Company of America ("HMCA"). (T 543).[1] The company was incorporated in the state of Delaware in 1994. (T 551). The company acted as a mortgage broker for individuals looking to finance a home. (T 556).

HMCA hired fourteen H-1B employees. Mr. David was responsible for the hiring of these employees and the determination of their salaries. (T 622, AX22 at 18). Mr. David stated that it was an attorney, Primitivo de Leon, who filled out the Labor Certification Applications, and that he was unaware of this process. (AX 22 at 24-25). Mr. David testified that he signed the applications, but did not read them. (AX 22 at 24-25, 39). Mr. David testified that the fourteen employees did the following work:

Diosdado David	advertising, marketing, loan packaging
Leni de Guzman	accountant credit analyst (prepared documents for loan applications)
Reynaldo de Guzman	marketing, advertising and client services
Marvin Del Rosario	IT
Evelyn Henson	credit analyst
Mylene Juan	credit analyst
Leonia Mayuga	credit analyst
Deogracias Mendoza	reviewed house appraisals
Maria Nacienciano	marketing management (coordinating with investors)
Christina Nario	credit analyst
Luisito Torres	packaging loans
Arturo Uy	marketing management
Vivian Uy Garcia	office manager (and coordinated with investors and accounting)
Amor Venzon	marketing, advertising and client services

Mr. David testified that he calculated each employee's salary by calculating the cost of his/her rent, life insurance, etc. Mr. Marvin del Rosario's rent, for example, was calculated at one third of a $1,300 monthly rent, the average rental rate in that location. (T 591). Life insurance was about $300 to $350 per employee each month, and medical insurance was approximately $80 to $100 per month per employee. (T 592). Mr. David also stated that he

[1] The following abbreviations are used herein: "T" refers to the Transcript of the Hearing and "AX" refers to Administrator Exhibits.

spent approximately $100 per week on food for Mr. del Rosario. (T 593-594). Mr. David did not record the amount he spent on food for employees. (T 594). Mr. David testified that he conducted the same calculations prior to, and during, the time that the employees were working for him, and that he did not currently know the whereabouts of these records. (T 637). Mr. David later testified that all of these numbers were estimates that he came up with the night before the hearing. (T 653). He explained earlier that "This is the only salary I can afford to pay them. When we grow, we may be able to increase the salary." (AX 22 at 23).

Two leases on housing were submitted by defendant. Mr. David testified that the apartment at 104 Quarry Road, Apartment K cost $800 a month and was occupied by his brother, Diosdado David. (T 640). Apartment E in the same building was $950 a month and occupied by Leni and Reynaldo de Guzman and Luisito Torres. (T 640-641). Copies of these leases were produced by the defense. Mr. David stated there were other residences where employees lived, but that he did not have copies of those leases. He stated that he paid by check, and that he could produce copies of those checks within ten days of the hearing. (T 644-646). Mr. David also testified that he split the cost of the utilities with his employees. (T 646). He later testified that he assessed a $100/month value on utilities to each employee, regardless of how many employees were occupying one residence. (T 651).

Mr. David testified that he would produce copies of the utility bills, as well as copies of the life insurance statements and the bills of sale on the three vehicles provided for the employees' transportation. (T 646-649). He stated that the employees would purchase gasoline and then be reimbursed. He assessed an $80/month value for the transportation to each employee. (T 650). At a deposition in December 2004, he said he would produce the same bills and had not as of the time of this hearing. (T 654-656).

These calculations were never put in writing for the employees, but Mr. David asserted that they were discussed at his meetings with the employees. (T 663). Mr. David testified that he never paid any taxes on the forms of compensation other than the weekly salaries (ie. housing, transportation, utilities). (T 681).

Testimony of the employees

Luisito Torres

Luisito Torres testified at the hearing on March 21, 2005. Mr. Torres was hired by a close friend of Mr. David, Bernardo Briones; thereafter he flew to the United States and began working for HMCA on September 29, 2001. (T 8-9). In March of 2002, HMCA sponsored an H-1B visa for Mr. Torres, for which Mr. Torres paid approximately $1,800. (T 10-12). He was referred by Mr. David to attorney Primitivo de Leon for the filing of the visa application. (T 12).

Mr. David told Mr. Torres he would be paid $400 a week. (T 8). Prior to receiving his visa, Mr. Torres was paid in cash on a weekly basis. After attaining the visa, he was paid with a check on a weekly basis. (T 17). At HMCA, Mr. Torres worked as a loan processor; he stated that he never worked as a computer programmer or analyst for HMCA. (T 18, 21). He testified that co-workers Marvin Del Rosario and Amor Venzon did the same type of work as he for

HMCA. (T 21). His workweek consisted of Monday through Friday 9 a.m. to 6:30 p.m. and Saturday 10 a.m. to 3 p.m. (T 21).

While working at HMCA, Mr. Torres resided at 104 Quarry Road, Apt. E, Hamburg, New Jersey, a two bedroom apartment that housed Mr. Torres and his wife and Leni and Reynaldo de Guzman. (T 22-23). The apartment was approximately 100 feet from HMCA. (T 24). Mr. Torres stated that he was never told that housing would be a part of his salary. (T 26). Mr. David paid the rent on the apartment, but the occupants paid the utility bills. (T 23, 26).

Mr. Torres testified that he was given a contract by Vivian Uy around the time of the Department of Labor's investigation. Mr. Torres stated that he signed this contract with HMCA in 2003, although it was dated April 15, 2002. (T 29). Mr. David said that someone from the DOL was coming, Sandra Steiner, and that Mr. Torres should not say anything that would hurt the company and to consider the ramifications for all the employees if HMCA were to close. (T 30-31). Mr. Torres recalls Ms. Steiner's visit as occurring sometime in 2003. (T 31).

Mr. Torres was fired from HMCA on September 6, 2004, at which time he was told that the company was downsizing and could no longer pay his salary. (T 26). He stated that he never signed Exhibit A-11, the Labor Condition Application. (T 32). For the purpose of obtaining an H-1B visa, Mr. Torres, with the assistance of co-worker Arturo Uy, obtained false transcripts created in the Philippines showing he was a computer programmer. (T 64, 103). Mr. Torres does have a degree in Civil Engineering, but was instructed by Mr. David to obtain documentation showing he was a "programmer." (T 64, 66, 99).

Amor Venzon

Amor Venzon testified at the hearing held on March 21, 2005. He stated that he began working for HMCA on approximately July 15, 2001, the day that he first met with Mr. David. (T 109). He was assigned to the bankruptcy department at HMCA and promised a salary of $350 per week. (T 110). HMCA sponsored an H-1B visa for Mr. Venzon, which was approved in November 2001. (T 110). Mr. Venzon paid approximately $1,850 in connection with this visa. (T 111).

Mr. Venzon testified that he was paid in cash. (T 112). He stated that he worked in the bankruptcy department, which entailed meeting with clients and their mortgage banks. (T 113-114). When asked if he ever worked as a system administrator, Mr. Venzon replied, "No, I didn't work as a systems administrator … I'm a computer literate, but I don't work that – that specific as – that profession as a systems administrator." (T 114). Mr. Venzon recalled that Reynaldo de Guzman also worked in the bankruptcy department. (T 114). He stated that the only system administrator was Marvin del Rosario. (T 118).

Mr. Venzon stated that he worked approximately twelve hours a day, Monday through Saturday. (T 115). He lived in a two bedroom apartment, which housed four people. (T 115). He was never told that housing was a part of his compensation. (T 115). He and the other occupants paid the utility bills. (T 115-116).

Marvin del Rosario

Marvin del Rosario testified at the hearing on March 21, 2005. Mr. del Rosario was contacted by Mr. David through his uncle while he was still in the Philippines. At that point, Mr. del Rosario obtained a tourist visa and came to the United States for the purpose of a job with HMCA. (T 154). After Mr. del Rosario arrived in the U.S., he met with Roland David and began working at HMCA on approximately May 22, 2001. There was no discussion of compensation during that meeting. (T 154-155).

HMCA sponsored an H-1B visa for Mr. del Rosario which was filed in approximately August 2001 and went through in December 2001. Mr. del Rosario paid for half of the expenses associated with that application, approximately $900. (T 155). Mr. del Rosario was referred to attorney Primitivo de Leon by co-workers Arturo Uy and Grace Nacienciano. (T 156). Mr. del Rosario is an Industrial Engineer by training, but was told by Mr. de Leon that his papers would have to reflect knowledge of computer engineering to be approved, and so, with the approval of Mr. David and the help of Arturo Uy, he obtained false documents created in the Philippines. (T 171-173). Mr. David knew that the documents were fabrications. (T 203).

Mr. del Rosario was initially paid $350 a week, and $400 a week from November 2003. He was paid in cash for about a year and a half, but then asked to be put on the payroll so he would have a record of his pay and taxes would be deducted. Mr. del Rosario stated that his work at HMCA consisted of maintaining computer hardware and user and technical support. (T 157). He worked Monday through Friday, 9 a.m. to 6:30 p.m., and Saturday, 10 a.m. to 3 p.m. (T 158-159).

Mr. del Rosario resided in two different homes owned by Mr. David while working for HMCA. The first was a one bedroom apartment which he shared with two other employees, Antonio Nakpil and Glenn Mendoza. (T 159). The second was a two bedroom apartment in which he lived with two other employees, Amor Venzon and Arnold Tagalao. (T 159-160). Mr. del Rosario was never told that housing was part of his compensation. He stated that the residents paid the utilities. (T 160).

Mr. del Rosario testified about an employment contract he signed. He stated that he signed it in 2003 the day before the DOL investigator came to the office, although it was dated 2001, after being asked to sign it and backdate it by Mr. David. Mr. David explained that he needed it backdated to comply with an audit. (T 161-162). Mr. del Rosario was also asked by Vivian Uy, the office manager of HMCA, to tell the investigator that he worked regular business hours, i.e. Monday through Friday, and that he had signed the employment contract in 2001. (T 162-163).

Reynaldo de Guzman

Mr. de Guzman testified at the hearing on March 22, 2005. Prior to coming to the United States, Mr. de Guzman obtained a Bachelor's degree in business administration and worked for Coca Cola bottlers for seventeen years. (T 211). He was hired by Roland David and began working for HMCA on September 27, 2001. (T 210). Mr. de Guzman paid approximately

$1,850 to attorney Primitivo de Leon for the purpose of obtaining an H-1B visa, which was sponsored by HMCA in December 2001. (T 212). Mr. de Guzman obtained a false diploma through Arturo Uy at HMCA; the diploma reflected a degree in marketing. (T 213-214). He stated that Mr. David told him that if he wanted the application to be approved, he must submit the false diploma, and since he was new to the company and his co-workers had done this, he felt obliged to comply. (T 246-247). Mr. de Guzman did not submit the documents to the attorney. (T 253). His job title was listed as "Marketing Research Analyst," but Mr. de Guzman stated that he never worked as such. (T 219).

Mr. de Guzman never discussed a salary with Mr. David. (T 211). He was paid $350 per week. (T 214). He was paid in cash for approximately one year, and then by check thereafter. He worked in the bankruptcy department preparing papers for bankruptcy, and did not do any market research. (T 215-216). Mr. de Guzman worked Monday through Saturday, 9 a.m. to 6:30 p.m. on weekdays and 11 a.m. to sometimes 7 p.m. on Saturdays. (T 216-217). While working at HMCA, Mr. de Guzman lived at 104 Quarry Road, a two bedroom apartment that he and his wife shared with another married couple. He was never told that housing was part of his compensation. (T 217). Mr. de Guzman paid for the utilities. (T 242).

Leni de Guzman

Leni de Guzman testified at the hearing held on March 22, 2005. Ms. De Guzman began working for HMCA on September 27, 2001 after she was hired by Roland David. (T 255). Prior to coming to the United States, Ms. De Guzman obtained a bachelor's degree in accounting and worked as an accountant. (T 256). She is married to Reynaldo de Guzman. (T 261). HMCA sponsored an H-1B visa for her that was approved in November 2001. She paid $1,805 for the expenses associated with obtaining the visa. (T 257).

Mr. David told Ms. de Guzman that she would be making $350 per week. (T 257). She was paid in cash for approximately six months, and was paid by check thereafter. (T 258). At first her work consisted of packaging loans to be sent to banking investors; she did not do any accounting. (T 259). About six months later she was transferred to the closing department, her work also did not consist of any accounting. (T 260). Ms. De Guzman stated that other accountants also worked at HMCA, but none of them actually did accounting work there. (T 260). She recalled Christian Nario, Vivian Uy, and Mylene Juan as accountants by trade that did not do accounting while working at HMCA. (T 261). Ms. de Guzman worked six days a week, Monday through Friday 9 a.m. to 6:30 p.m. and Saturdays 10 a.m. to 3 p.m. (T 261).

While working at HMCA, Ms. de Guzman lived in an apartment owned by Mr. David. (T 261). She did not pay rent, but paid the utility bills. (T 261-262). It was a two bedroom apartment, which she and her husband shared with the Torres couple. (T 262). She was never told that housing was a part of her compensation package and never signed an employment contract. (T 262). Ms. de Guzman was fired by Roland David after leaving work to go to the doctor's, and, subsequently, she and her husband were told to move out of the apartment. (T 262-263).

Ms. de Guzman discussed her firing from HMCA with her pastor, who suggested she speak with a friend of his in the INS. Ms. de Guzman met with the man from the INS, who requested she bring her pay stubs with her to the meeting. After a few months, she received a call from the Department of Labor requesting an interview. As she understands it, the DOL then conducted an investigation into HMCA. (T 266-267).

Arturo Uy

Arturo Uy testified at the hearing held on March 23, 2005. Mr. Uy began working for HMCA in 2001. (T 488). He works as a credit analyst. (T 490). He described his compensation package as including medical insurance for him and his family, housing, use of a vehicle, life insurance, and food on a frequent basis. (T 489). He resided in the housing by himself, as his wife and children lived in New York. (T 489-490). He shared that apartment with another couple.

Mr. Uy's attorney for his H-1B petition was Primitivo de Leon. Mr. Uy stated that he hired Mr. de Leon and then referred him to his co-workers when they asked. (T 490-491). Mr. Uy paid approximately $1,100 in connection with his H-1B petition. (T 497). He denied helping the other employees obtain false documents. (T 491).

Mr. Uy currently works for Mr. David at HMC Financial. (T 493). He is seeking a green card which is being sponsored by Mr. David; his wife is also being sponsored by her own employer. (T 494-495).

Grace Nancienciano

Grace Nancienciano testified at the hearing held on March 23, 2005. She first came to the United States on a tourist visa in 2001. (T 498). She was interviewed by Mr. David. Her attorney was Primitivo de Leon; she testified that she chose him and paid his fees. (T 500).

Ms. Nancienciano had an employment contract with HMCA. Although not everything was listed on the contract, she understood her compensation included a weekly salary, housing, transportation, health insurance, some food and occasional utility bills. (T 502-503). Her weekly salary started at $350; currently she earns $450. (T 509). Ms. Nancienciano discussed the calculation of her benefits with Mr. David, but did not know a breakdown of the benefits as to how much each was worth. (T 512-514).

Ms. Nancienciano currently works for Mr. David at HMC Financial. (T 506). She is seeking a green card, which Home Mortgage is sponsoring. (T 507).

<u>Testimony of Agnes David</u>

Agnes David testified at the hearing held on March 23, 2005. Ms. David is the wife of Roland David. At the time of the hearing, they were in the process of divorcing. (T 518-519). Ms. David participated in Bible studies with some of the employees of HMCA. (T 519-520).

Testimony of Susan Steiner

Susan Steiner testified at the hearing held on March 22-23, 2005. Ms. Steiner is an investigator with the Wage and Hour Division of the Department of Labor, where she has worked for thirty years. (T 301-302). Ms. Steiner began working on this investigation in June 2003. (T 303). Wage and Hour was contacted by an INS agent, whereupon Wage and Hour requested that the individual complainant contact them directly. After hearing from that complainant, Wage and Hour contacted HMCA and requested records. (T 302-304). Vivian Uy contacted Ms. Steiner to set up a meeting. Ms. Steiner met with Ms. Uy and Mr. David on July 30, 2003. (T 304, 319). Ms. Steiner looked through HMCA's records, including the LCA applications and payroll records. (T 304).

Ms. Steiner compared the LCA applications with the payroll records of HMCA. She found a discrepancy between the salaries listed on the applications, averaging about $35,000/year, and the payroll records which showed salaries averaging about $20,000/year. (T 318-319). Mr. David explained that he provided these employees with housing, transportation, and life and medical insurance. (T 321). Mr. David was unable to specify exactly how he calculated this compensation. (T 321). He was unable to provide records of these benefits. (T 321).

Ms. Steiner next met with Vivian Uy, and possibly Roland David, on September 25, 2003. (T 319-320). The purpose of this meeting was to talk to the employees. Ms. Uy provided Ms. Steiner with copies of employment contracts of current employees. (T 322). She said that she would provide the same for former employees, but did not. (T 324). The third meeting occurred in November 2003 with Mr. David and Ms. Uy. (T 320). At this meeting, Ms. Steiner asked for certain corporate information, such as 1120 corporate tax forms, but they were unable to provide it at that time. (T 325-326). They did provide the 1120 form at the fourth meeting, which was in March 2004 with Mr. David and Ms. Uy. (T 320, 326). A month later, Ms. Steiner was provided with information on the housing involved, but it was not detailed enough to determine if it was acceptable compensation. (T 326-327). Ms. Steiner also met with the H-1B employees and the other American employees of HMCA. (T 388-389).

Testimony of Mary Dodds

Mary Dodds testified at the hearing held on March 23, 2005. Ms. Dodds is a Regional Enforcement Coordinator for the DOL, Wage and Hour Division. (T 399). She has worked there for twenty-six years. She is involved in every H-1B case in New York, New Jersey, and Baltimore. (T 400).

Ms. Dodds explained that the agency must have cause to investigate a reported violation. Here, the cause was the discrepancy between Leni de Guzman's pay and the pay listed on the LCA submitted to the DOL. (T 403). Ms. Dodds begins by requesting documents, including the LCA, from the employer. (T 404-405). She does not request an employee's diploma or transcripts, because they have no relevance in this type of investigation and are outside her jurisdiction. (T 405). The regulations require that the employer maintain all documents that

would evidence compliance with the statute, including payroll documents. (T 406). By statute, the employer must bear the LCA fee and all associated costs, including attorney's fees. (T 407).

In March 2004, Ms. Dodds met with Mr. David and Ms. Uy. (T 408). She informed Mr. David that according to the payroll records, these employees had been grossly underpaid. Mr. David said that they were also provided housing. Ms. Dodds explained that then the employee must have agreed to it in writing and the fair market value of the housing treated as wages and taxed. (T 408-409). Mr. David provided some records, which included a couple of leases, but not enough to show it amounted to the fair market value of what he was asserting. Therefore, Ms. Dodds treated housing as a benefit, rather than wages that would offset her computations. (T 409). There were two copies of leases, one which had a monthly rent of $800 a month and another with a monthly rent of $950. Ms. Dodds was not provided with any other documents that would establish the fair market value of housing provided by HMCA. (T 410). Ms. Dodds also testified about a letter from Primitivo de Leon, dated November 28, 2001, to Roland David, which she interpreted as meaning Mr. de Leon represented HMCA. (T 411).

Ms. Dodds eventually determined that HMCA and Roland David committed violations with regard to the H-1B employees. (T 412). These violations were 1) failure to pay and 2) misrepresentation of a material fact. (T 412-413). Failure to pay was established by the payroll records which showed gross underpayment, employee and employer interviews, and the employment contracts which Ms. Dodds found unreliable. (T 413). No credit was given for housing because there were no written agreements specifying that housing would be deducted from the employee's wages, and it was not treated as wages in that no taxes were taken from the amount of housing. (T 420). Wage and Hour considered the failure to pay to be willful because "There was such a big disparity between what was on the LCA file … signed by Mr. David, and what was paid to employees … (and) … the housing was an after thought on his part when they found out about the United States Department of Labor investigation." (T 422).

With regards to the second violation, willful misrepresentation, the burden is to show that the employer knew at the time he submitted the classification that the employee would not work in that classification. This is most often proved in circumstances where the employee was working in a different position at the time of the filing. (T 423-424).

Exhibits A1 through A14 and relevant testimony

NAME	POSITION AS DESCRIBED IN APP.	POSITION AS DESCRIBED IN TESTIMONY	SALARY ON LCA V. ACTUALLY PAID	CONTRACT WITH HMCA?	TESTIMONY REGARDING PAY/CONTRACT?
David, Diosdado	Credit analyst: Data collection Evaluates customer's status Analyzes credit risk, etc.		33,758.00/ Yearly 300.00-350.00/ Weekly		
De Guzman, Leni	Accountant: Analyze financial info.	Packaging and closing departments-	38,700.00/ yearly		Never told housing was part of compensation

	Prepare reports Balance sheets Project company's financial position	No accounting (T 259-261)	350.00/ Weekly		
De Guzman, Reynaldo	Marketing Research Analyst: Analyze market conditions Forecast marketing trends Gather data	Bankruptcy department- Never worked as a Marketing Analyst. (T 215-216)	48,300.00/ yearly 350.00/ Weekly		Never told housing was part of compensation
Del Rosario, Marvin	System Administrator: Evaluate feasibility of programs Develop programs for clients Write instructional manuals	Computer and technical support	52,302.00/ Yearly 350.00/ Weekly	YES	"Rent was for rendering extra work" (A4(E)) Asked to sign and backdate employment contract in 2003 (T 161-162)
Henson, Evelyn	Accountant: Compile and analyze financial info Prepare balance sheets Inspect bookkeeping Prepare reports	"I did the same work as Leni De Guzman … I did not do account work." (A5 (C)).	38,700.00/ Yearly 350.00/ Weekly		"He told us we worked extra … to pay for our housing." (A5(C)).
Juan, Mylene	Accountant: Compile and analyze financial info Prepare balance sheets Inspect bookkeeping Prepare reports		35,000.00/ Yearly 300.00/ Weekly	YES	
Mayuga, Leonia	Accountant: Compile and analyze financial info Prepare balance sheets Inspect bookkeeping Prepare reports		38,485.00/ Yearly 350.00-400.00/ Weekly		
Mendoza, Deogracias	Junior Architect: Lay out a proposed building plan Work with an architect on planning new developments		31,595.00/ Yearly		
Nacienciano, Maria	Credit Analyst: Data collection Evaluates customer's status Analyzes credit risk, etc.		34,168.65/ Yearly 350.00/ Weekly	YES	Stated that she understood her compensation as including housing, etc. (T502-503)
Nario, Christina Olizel	Accountant: Prepare monthly reports Maintain books Reconcile accounts Prepare payroll		36,400.00/ Yearly 400.00/ Weekly	YES	

	Handle accounts payable and receivable				
Torres, Luisito	Computer Analyst/Programmer: Evaluate feasibility of programs Develop programs for clients Write instructional manuals	Loan processor. Never worked as an analyst or programmer (T 18, 21)	41,704.00/ Yearly 400.00/ Weekly	YES	Never told housing was part of compensation Signed contract in 2003 under duress from Mr. David (T29-31)
Uy, Arturo	Credit Analyst: Data collection Evaluates customer's status Analyzes credit risk, etc.	Credit analyst (T490)	34,168.65/ Yearly 350.00/ Weekly	YES	Stated that he understood his compensation as including housing, etc. (T489)
Uy Garcia, Vivian	Accountant: Prepare monthly reports Maintain books Reconcile accounts Prepare payroll Handle accounts payable and receivable		36,400.00/ Yearly 400.00/ Weekly	YES	
Venzon, Amor	System Administrator: Evaluate feasibility of programs Develop programs for clients Write instructional manuals	Bankruptcy department (T 113-114)	52,564.00/ Yearly 350.00/ Weekly		

Exhibit AX 17

This exhibit is an internal phone list from HMCA. It lists the employees and their area of work. The following is what it lists for the employees involved in this case:

Diosdado David	Customer Service/Operations
Leni DeGuzman	(Not listed)
Reynaldo DeGuzman	Foreclosure/Bankruptcy Workout & Administration
Marvin Del Rosario	Customer Service/Closing and Funding
Evelyn Henson	(Not listed)
Mylene Juan	Customer Service and Processing
Leonia Mayuga	Closing and Funding
Deogracias Mendoza	Processing and Administration
Maria Nacienciano	Closing and Funding
Christina Nario	Processing and Administration
Luisito Torres	Customer Service/Closing and Funding
Arturo Uy	Customer Service/Closing and Funding
Vivian Uy Garcia	(Not listed)

Amor Venzon (Not listed)

Exhibit AX 18

This exhibit contains two leases - one for 104 Quarry Road, Apartment K, Hamburg, New Jersey and one for 104 Quarry Road, Apartment E, Hamburg, New Jersey. The one year lease for Apartment K shows an $800 per month rent. The one year lease for Apartment E shows a $950 per month rent.

Exhibits AX 20 and AX 21

Exhibit AX 20 is a breakdown of the back wages owed to fourteen employees of HMCA as calculated by Wage and Hour. It lists each employee, the weeks they worked at HMCA, the salary amount according to the LCAs, the salary paid to the employees and the difference between the two. Wage and Hour then totaled the discrepancies, plus Legal/INS fees, which resulted in a total of $513,036.56 in unpaid wages. (AX 21).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Immigration and Nationality Act H-1B visa program, 8 U.S.C. § 1101, et seq., requires an employer seeking to hire H-1B employees to submit a Labor Condition Application ("LCA") to the Department of Labor. 8 U.S.C. § 1182 (n)(1). The LCA must include the following:

> (A) The employer -
>
> (I) is offering and will offer during the period of authorized employment to aliens admitted or provided status [as an H-1b non-immigrant] wages that are at least:
>
> (I) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or
>
> (II) the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available at the time of filing the application.
>
> …
>
> (D) The application shall contain a specification of the number of workers sought, the occupational classification in which the workers will be employed, and the wage rate and conditions under which they will be employed.

[8 U.S.C. § 1182 (n)(1)(A), (D)]. The Department of Labor then checks the application for completeness and certifies the application, allowing the INS to then approve the H-1B visa petition. 8 U.S.C. § 1101(a)(15)(H)(I)(b); 20 C.F.R. §655.700(a)(3).

The corresponding regulations allow the Administrator to investigate, among other possible violations, whether the H-1B employer failed to pay wages (including benefits provided as compensation for services) or failed to specify accurately on the labor condition application the occupational classification in which the employee would be employed. 20 C.F.R. § 655.805(a)(2),(6)

I. Willful Failure to Pay Wages as Required by 8 U.S.C. §1182(n)(1)(A) and C.F.R. §655.731(c).

A. Failure to Pay Wages

The prevailing wage shown on each LCA was the wage that HMCA was required to pay each of the fourteen H-1B employees. 8 U.S.C. § 1182(n)(1)(A). An employer satisfies his required wage obligations by paying this wage "to the employee, cash in hand, free and clear, when due, except that deductions made in accordance with paragraph (c)(9) of this section may reduce the cash wage below the required wage." 20 C.F.R. § 655.731(c)(1). This wage must be reflected in employer's payroll records, and taxes withheld and paid to the IRS. 20 C.F.R. § 665.731(c)(2)(i),(ii).

Here, Respondent does not deny that the employees were not paid a weekly wage equal to that shown in the LCA. Instead, he contends that employees were offered a compensation package, which was in writing and signed by the employees at the beginning of their employment, that offset the difference in wage and therefore constituted "authorized deductions" as set forth in 20 C.F.R. § 655.731(c)(9). The Administrator contends that the compensation packages are invalid, and that even if valid, the benefits do not compensate for the discrepancy between the required wage and the actual weekly wage received by the employees. I agree with the Administrator for the reasons set forth below.

It is undisputed that the fourteen H-1B employees employed by HMCA were not paid their prevailing wage. In order to receive a "credit" for the fair market value of the benefits provided (ie. housing, food, utilities), the employer must have made such deductions in compliance with 20 C.F.R. § 655.731(c)(9). In order to deduct certain benefits, such as housing, from an employee's required wage, the employer must completely comply with one of the three paragraphs listed in 20 C.F.R. § 655.731(c)(9). The applicable paragraph here is (c)(9)(iii), which requires:

(iii) Deduction which meets the following requirements:

> (A) Is made in accordance with a voluntary, written authorization by the employee (Note to paragraph (c)(9)(iii)(A): an employee's mere acceptance of a job which carries a deduction as a condition of

> employment does not constitute voluntary authorization, even if such condition were stated in writing);
>
> (B) Is for a matter principally for the benefit of the employee (Note to paragraph (c)(9)(iii)(B): housing and food allowances would be considered to meet this "benefit of employee" standard, unless the employee is in travel status, or unless the circumstances indicate that the arrangements for the employee's housing or food are principally for the convenience or benefit of the employer (*e.g.,* employee living at worksite in "on call" status));
>
> (C) Is not a recoupment of the employer's business expense (*e.g.,* tools and equipment; transportation costs where such transportation is an incident of, and necessary to, the employment; living expenses when the employee is traveling on the employer's business; attorney fees and other costs connected to the performance of H-1B program functions which are required to be performed by the employer (*e.g.,* preparation and filing of LCA and H-1B petition)). (For purposes of this section, initial transportation from, and end-of-employment travel, to the worker's home country shall not be considered a business expense.);
>
> (D) Is an amount that does not exceed the fair market value or the actual cost (whichever is lower) of the matter covered (Note to paragraph (c)(9)(iii)(D): The employer must document the cost and value); and
>
> (E) Is an amount that does not exceed the limits set for garnishment of wages in the Consumer Credit Protection Act, 15 U.S.C. 1673, and the regulations of the Secretary pursuant to that Act, 29 CFR part 870, under which garnishment(s) may not exceed 25 percent of an employee's disposable earnings for a workweek.

20 C.F.R. § 655.731(c)(9)(iii).

Compliance with one part of the above regulation is not sufficient; the employer must comply with all five of the requirements. Here, Respondent argues that he meets criteria (A), that the employees voluntarily authorized such deductions from their pay and agreed to it in writing. I do not agree. First, there are only employment contracts for seven of the fourteen employees involved. Of these seven, two employees, Luisito Torres and Marvin Del Rosario, testified that they signed the contracts in 2003, not 2001, and were coerced into signing the contracts after the DOL investigation began. Mr. Torres said he was told that if he did not backdate and sign the contract, there would be a negative impact on all the employees. Mr. del Rosario said he was asked to backdate the contract by Mr. David and asked to lie to the DOL investigator by Ms. Uy, saying that he signed the contract in 2001 and that he worked regular business hours. Furthermore, Leni and Reynaldo de Guzman, neither of whom signed employment contracts, testified that they were never told that housing was part of their compensation.

The only employees who stated that they had an employment contract with HMCA from the beginning were Arturo Uy and Grace Nancienciano, both of whom are currently employed by Mr. David and are awaiting green cards which their employer is sponsoring. The testimony of these six employees, coupled with the absence of any employment contracts for employees who were no longer employed by HMCA during the investigation, forces me to conclude that the employment contracts provided are invalid.

Since there was no voluntary, written authorization by the employees, the deductions from the H-1B employees' wages were not done in compliance with 20 C.F.R. § 655.731(c)(9)(iii)(A). Noncompliance with this one part of the regulation precludes the awarding of a credit in this case because the regulation is conjunctive. Because I find that the employment contracts were invalid, I find it unnecessary to delve into the discrepancy between the wages paid to the employees and the prevailing wage on the LCA, and the fair market value of the benefits.

In addition to the discrepancy in wages, the Administrator added $1,500 to the amount owed to each employee to compensate them for the fees they paid in connection with the visa. Pursuant to the regulations, the employer may not receive, nor may the H-1B employee pay, any part of the visa filing fee or attorney fees incurred in connection with its filing. 20 C.F.R. §§ 655.731(c)(9)(ii) and (iii)(C); 20 C.F.R. § 655.731(c)(10)(ii). Pursuant to 20 C.F.R. 655.810(e)(1), the Administrator may order the employer to return such funds paid by the employee. Here, based upon both the employees and Mr. David's testimony, it is clear that the employees paid the fees involved with their visa. Employees testified to paying amounts between $900 and $1,850. I find that $1,500 per employee is a fair estimate of the costs incurred by the employees.

Only the amount that is reflected on HMCA's payroll, from which taxes were withheld and paid to the government, count as wages paid to the employees. 20 C.F.R. § 665.731(c)(2)(i) and (ii). The difference, therefore, is owed to the employees, plus $1,500 per employee for costs wrongfully incurred by them in connection with their visas. The total owed by the Employer is $513,036.56.

B. Willful Violation

After determining there was a violation of the INA, one must determine if the violation(s) were willful, meaning there was "a knowing failure or a reckless disregard with respect to whether the conduct was contrary to section … § 655.731." 20 C.F.R. § 655.805(c). This determination is important, as only violations, as set forth in 20 C.F.R. §655.805(a)(2), that are willful allow for the assessment of penalties and disqualification. 20 C.F.R. § 655.805(b).

Respondent has maintained that he was unaware of the legal requirements set forth under the Act and its regulations, and that any noncompliance was the failure of attorneys or the employees themselves. While Respondent may not have been well versed on the INA, his failure to investigate his responsibilities under the Act, and the level of disparity between the LCA and the employees' weekly wages, amounts to a "reckless disregard" for which penalties and disqualification are warranted.

On each LCA application, filed by the Employer, there is the following statement immediately above the signature line:

> H. Declaration of Employer
> By signing this form, I, on behalf of the employer, attest that the information and labor condition statements provided are true and accurate; that I have read sections E and F of the cover pages (Form ETA 9035CP), and that I agree to comply with the Labor Condition Statements as set forth in the cover pages and with the Department of Labor regulations (20 C.F.R. part 655, Subparts H and I).

(AX1-14). Additionally, next to the signature line is a statement warning of civil or criminal actions if the statements made therein are found to be fraudulent. These statements not only warn the signer of possible actions against him, but point him to the appropriate sections of the regulation to ensure compliance. Mr. David's defense that he did not read the applications is not good enough. The forms themselves make one fully aware of the need for compliance.

The disparity between the salary listed on the LCAs and the weekly wage actually received by the employees is significant. On average, per Wage and Hour's estimate, there were weekly deficiencies ranging between $118 and $673 per employee. Respondent stated that he believed the benefits offered to employees compensated for this discrepancy. Mr. David first stated that he had made such calculations prior to each employee beginning work, but later admitted that he made such calculations the night before the hearing. The value of each benefit was hastily concocted; for instance, each employee was deemed to have received a $100 benefit of utilities each month, even though employees lived in different sized housing and with varying numbers of people. Several employees, including Mr. Torres, Mr. Del Rosario, and Leni and Reynaldo de Guzman, stated that they paid the utilities themselves. The calculations obviously bear no correlation to the fair market value of the benefits, such that they constitute a blatant fabrication.

This violation is compounded by Mr. David's efforts to thwart the DOL's investigation by not producing documents, by coercing employees to sign back dated employment contracts and by materializing calculations for benefits. I find that the failure to pay wages in accordance with 20 C.F.R. § 655.805(a)(2) was willful as defined by the regulations, and therefore civil penalties and disqualification are warranted per 20 C.F.R. §655.805(b).

Factors that may be considered in the Administrator's assessment of penalties include:

(1) Previous history of violation, or violations …
(2) The number of workers affected …
(3) The gravity of the violation or violations;
(4) Efforts made by the employer in good faith to comply with the provisions of [the statute and regulations];
(5) The employer's explanation of the violation or violations;
(6) The employer's commitment to future compliance; and

(7) The extent to which the employer achieved a financial gain due to the violation, or the potential financial loss, potential injury or adverse effect with respect to other parties.

20 C.F.R. §655.810(c).

The Administrator has suggested a $4,000 fine per violation as permitted by 20 C.F.R. § 655.810(b)(2)(i), for a total of $56,000. Mary Dodds testified that this number was arrived at by starting at the maximum $5,000 fine for the each violation, and then applying a 20% reduction factor. The Administrator's assessment, issued on August 6, 2004, was signed by the District Director of Wage and Hour Division, Joseph Petrecca. The decision whether to impose penalties or not is a discretionary one, made by the Administrator. My current review of such action is limited to deciding whether the Administrator's action was arbitrary and capricious, or an abuse of discretion. Administrator v. Kutty, et al., Case Nos. 01-LCA-10-25 (ALJ October 9, 2002), aff'd, ARB Case No. 03-022 (May 31, 2005). Although there is no testimony as to what factors listed above were considered here, I gather that the number of employees affected, and the lack of good faith, explanation or concern for future compliance, were certainly considered. For this reason, I find that the Administrator's assessment is reasonable.

According to 20 C.F.R. § 655.810(d)(2), the Administrator shall disqualify the employer from approval of any petitions filed by, or on behalf of, the employer for a period of at least two years for a willful failure to pay wages. The Administrator has requested such disqualification, and therefore, pursuant the above section, the Employer shall be disqualified.

I. Willful Misrepresentation of a Material Fact on Labor Condition Applications in violation of 20 C.F.R. §655.730.

A. Misclassification

A Labor Certification Application, completed and filed by the employer, must include the occupational classification of the worker(s) sought. 8 U.S.C. § 1182 (n)(1)(D); 20 C.F.R. § 655.730(c)(1). The Administrator may investigate any misrepresentations of occupational classifications. 20 C.F.R. §655.805(a)(6). Here, I find that there were several employees whose jobs at HMCA did not match the job classification on the LCA.

Four employees testified at the hearing that the jobs they actually performed were not as listed on the LCA: Leni de Guzman, Reynaldo de Guzman, Luisito Torres and Amor Venzon. While the description of their actual jobs varies from Mr. David's description, Mr. David's testimony confirms that these employees did not perform the jobs listed on the LCAs. Furthermore, the testimony of several of the employees indicates other employees that also were performing different jobs than listed on their LCAs, such as Ms. de Guzman's testimony about other "accountants," and Mr. Venzon's testimony about Mr. de Guzman also working in the bankruptcy department.

Not only does the testimony establish a discrepancy, but the phone list from the company that identifies each employee's job does as well. Cross- referencing all of the testimony, I find

that the employees are credible, and as many as thirteen of the fourteen H-1B employees were not performing as the job classification on the LCAs suggest. I find that only one H-1B employee, Marvin Del Rosario, was performing a job as listed on the LCA.

Therefore, I find that the employer violated 20 C.F.R. §655.730 in misrepresenting a material fact on a Labor Certification Application, namely misrepresenting the job classifications of as many as thirteen H-1B employees.

B. Willful or Substantial Violation

Penalties and disqualification may be assessed for violations, as described in 20 C.F.R. §655.805(a)(6), that are willful or substantial. 20 C.F.R. § 655.805(b). The definition of "willful" and the determining factors described above in Section I (B) of this Order are again applicable here.

As Mary Dodds explained, the willingness of a misclassification is usually proven by the fact that the employees worked in a certain capacity prior to the filing of the LCA, and continued to engage in the same work afterwards. This shows that the employer knew what type of work was needed at the time of the application, as that was the need the employee was currently fulfilling, and filed it with a different classification anyway. This was the case at HMCA; all of these employees began working for the Employer prior to the filing of the LCAs. It is clear from Mr. David's testimony and the circumstances surrounding the filings and the false documentation involved, that Mr. David felt a certain classification would be approved and misrepresented the actual nature of the jobs performed by the employees to ensure approval. Although there is no definition of "substantial" in the regulations, these violations could also be viewed as substantial.

Since the violations were willful and substantial, civil money penalties are permitted, up to $5,000 per violation, pursuant to 20 C.F.R. § 655.810(b)(2)(ii). The Administrator seeks a penalty of $4,000 for seven violations pertaining to the misrepresentation of job classifications, for a total of $28,000. As discussed in the previous section on money penalties, the Administrator has discretion in assessing such penalties. My review is only for abuse of such discretion. Here, I find no abuse, as there is evidence of more than seven violations of this section, and therefore find that a penalty of $4,000 for each of seven violations is reasonable.

According to 20 C.F.R. § 655.810(d)(1), the Administrator shall disqualify the employer from approval of any petitions filed by, or on behalf of, the employer for a period of *at least* one year for a misrepresentation of a material fact on a labor condition application. Here, the Administrator asks for a disqualification of two years; therefore, the Employer is disqualified for two years pursuant to the above section.

II. Liability

The Administrator named Roland David as an individual and HMCA as Respondents in this case. The Administrator seeks to hold Mr. David individually liable for the back wages, civil penalties and disqualification assessed in this case by asserting that HMCA was the alter

ego of Mr. David. Respondents argue that Mr. David never commingled personal funds with those of HMCA and that corporate formalities were adequately maintained.

In United States v. Pisani, the Third Circuit created a uniform federal rule for piercing the corporate veil in cases arising out of federal programs. United States v. Pisani, 646 F.2d 83, 86 (1981)(deciding that applying state law to cases involving Medicare could frustrate its purpose of providing prompt reimbursements to providers).[2] Fortunately, for our purposes here, New Jersey law lays out the same criteria for determining whether or not to pierce the corporate veil.[3]

Relevant factors used to pierce the corporate veil under an alter ego theory include: undercapitalization, failure to observe corporate formalities, non-payment of dividends, non-functioning of other officers or directors, absence of corporate records, the fact that corporation is merely a façade for the dominant shareholder(s), etc. Pisani at 88. Additionally, the situation must present some sort of injustice or fundamental unfairness, which may be shown by proving some of the factors listed above. Id.

There is a failure to follow corporate formalities when there were never any stock certificates issued, dividends paid, or shareholder or director meetings. An alter ego relationship, or façade, exists when there is only the president of the corporation, no other corporate officers, and the president is the sole shareholder and director.[4] I find that both of these conditions existed in the present case, and therefore that Roland David is liable for the back wages and civil money penalties.

From Mr. David's testimony, there was little separation between himself and HMCA. Mr. David testified that he was the Owner and President of HMCA, sole shareholder and only director. There were never any other corporate officers besides Mr. David. He made all decisions affecting HMCA, including the hiring and firing of the H-1B employees. The record contains the Certificate of Incorporation of HMCA filed in 1994, and the By-Laws of the corporation. (AX 19 and 22). Even though required by HMCA's bylaws, there were never any directors or shareholders, or any meetings amongst them. Neither were dividends paid nor stock certificates issued. In fact, there are no internal corporate records which would indicate that HMCA operated as a corporation in the legal sense. There is simply no distinction between the corporation and Mr. David.

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[2] See also United States v. Kimbell Foods, Inc., 440 U.S. 715, 726 (1979)("(F)ederal law governs questions involving the rights of the United States arising under nationwide federal programs"); United States v. Bestfoods, 524 U.S. 51, 55 (1998)(leaving open the question whether state or federal law applies to pierce the corporate veil in cases involving federal statutes).

[3] E.g., The Mall at IV Group Properties v. Lucille Roberts, et al., 2005 WL 3338369, at 3 (D.N.J. December 8, 2005)(applying a two part test: first, that there was such a unity of interest and ownership that the corporation and the individual are indistinguishable, and, second, that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice).

[4] See 45 Am. Jur. Proof of Facts 3d 1 (2005).

The second part of the test, an element of fraud or injustice, is handled differently depending on the court. Under New Jersey law, it requires more than just a showing that the plaintiff will be unable to collect a judgment unless the corporate veil is pierced. Mall at IV Group Properties v. Lucille Roberts, et al., 2005 WL 3338369, at 3 (D.N.J. December 8, 2005)(stating that "[T]here must be some "wrong" beyond simply a judgment creditor's inability to collect"). However, in Administrator v. Kutty, this factor, combined with the willful violation of the INA, proved to be enough to warrant individual liability. Administrator v. Kutty, et al., ARB Case No. 03-22 (May 31, 2005)("In light of the fact that the employing corporations are out of business and likely have no assets, a decision not to hold Kutty liable would be grossly unfair to the doctors because Kutty willfully violated the requirements of the Act"). In Pisani, the Third Circuit found that the showing of factors in the first part of the alter ego test, such as non-functioning officers or absence of corporate records, could satisfy the fraud or injustice element. Pisani, at 88.

I find that there was an element of injustice in the way Mr. David operated HMCA, not only by virtue of the lack of separation between himself and the corporation, but by the way this affected the H-1B employees. By not maintaining adequate records, Mr. David and HMCA did not comply with the requirements of the H-1B program, namely paying employees off of a payroll, and withholding taxes and remitting them, so as to qualify as "wages." There are no records of other "benefits" provided to the employees, such that the employees were never able to ascertain the amount of their pay, and were underpaid. Had HMCA been operated as a corporation, adhering to corporate formalities and not just at the whim of Mr. David, then many of these problems might have come to light or likely been prevented. This is a sufficient injustice under any of the above named cases, and warrants holding Mr. David individually liable.

I conclude that in addition to the corporate Respondent, Mr. David should be held individually responsible as an employer for the violations of the statute and regulations.

ORDER

IT IS THEREFORE ORDERED that Respondents shall pay back wages totaling $513,036.56 to the following persons in the specified amounts:

Diosdado David	$19,011.93
Leni De Guzman	$20,374.97
Reynaldo De Guzman	$45,187.46
Marvin Del Rosario	$92,008.82
Evelyn Henson	$13,499.98
Mylene Juan	$46,596.36
Leonia Mayuga	$22,374.80
Deogracias Mendoza	$8,183.60
Maria Nacienciano	$33,341.17
Christina Nario	$51,390.00
Luistio Torres	$40,896.00

Arturo Uy	$50,808.77
Vivian Uy Garcia	$37,693.80
Amor Venzon	$31,668.90

IT IS FURTHER ORDERED that Respondents shall pay civil money penalties totaling $84,000.00 to the Wage and Hour Division and be disqualified from filing new H-1B petitions for a period of two years.

A

PAUL H. TEITLER
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. §655.845, any party dissatisfied with this Decision and Order may appeal it to the Administrative Review Board, United States Department of Labor, Room S-4309, Francis Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210, by filing a petition to review the Decision and Order. The petition for review must be received by the Administrative Review Board within 30 calendar days of the date of the Decision and Order. Copies of the petition shall be served on all parties and on the administrative law judge.